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IN THE

Supreme Court of the United States

October Term, 1940

No. 42

THE UNITED STATES OF AMERICA,
Petitioner,

—*v.*—

SALVATORE FALCONE, JOSEPH FALCONE, HENRY ALBERICO, NICHOLAS NOLE and JOHN NOLE.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT, HENRY ALBERICO.

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BRIEF FOR RESPONDENT, HENRY ALBERICO.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 234-239) is reported in 109 F. (2d) 579.

Question Presented.

Whether the seller of goods, in themselves innocent, becomes a conspirator with——or, what is in substance the same thing, an abettor of——the buyer, because he knows that the buyer means to use the goods to commit a crime.

Statutes Involved.

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), so far as pertinent, provides:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy, shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 332 of the Criminal Code (U. S. C., Title 18, Sec. 550) provides:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, as a principal.

Statement.

On appeal by the respondents, Henry Alberico, Joseph Falcone and Salvatore Falcone, and three other defendants, the Circuit Court of Appeals for the Second Circuit, reversed the conviction of the respondents and affirmed the convictions of the others, (R. S. 241-242), but with respect to respondents, the evidence was held to be insufficient to

the objective rule of liability, which the Circuit Court of Appeals laid down. The evidence on the trial against the respondent, Henry Alberico, was as follows:

The firm of Alberico and Funicello was a partnership having been in business for the past twenty years in the City of Utica and employed four travelling salesman who traveled over a radius of approximately two hundred miles from the City of Utica; that the firm sold to approximately 1500 retail customers outside the City of Utica, N. Y. The firm dealt in about 525 different articles among them sugar, and 5 gallon tin cans. (R. 98).

Between January, 1937 and Sept. 1938, 9743 bags of sugar of 100 lbs. each were purchased by respondents' firm which sugar had been purchased in the open market from four different jobbers and wholesalers (R. 140).

Between June, 1936 and March, 1938 there was purchased by the respondents' firm 30,500 five gallon tin cans from the Atlas Can Co. These cans were sold to other concerns throughout several states, and all transactions had with respondent were in the usual course of business, on credit and it was the usual procedure for wholesale grocers to buy 5 gallon tin cans, (R. 73-74).

Although evidence was given in regards to twenty-two stills at only one and on one occasion was a carton found upon which was stencilled "Alberico & Funicello" from Atlas Can Co. Brooklyn, N. Y. (R. 39).

On eight occasions one Salvatore Morreale who was indicted as a co-conspirator but not tried nor convicted[1]

[1] The statement in the Government's brief that Morreale was one of the convicted defendants is erroneous.

went with one of his (Morreale) employees named Blake to the warehouse of Alberico & Funicello. Blake stated on one occasion during March, 1938 he heard the following conversation between Alberico and Morreale. Salvatore Morreale said to Alberico, "You could have trusted me for sugar this morning." Alberico replied, "I can't trust you because your business is too risky." (R. 52-53).

That Salvatore Morreale and his family have operated a grocery store in the City of Utica, for several years and that they have been a customer of the firm of Alberico & Funicello (R. 101) during the entire period.

During the early part of 1937 circulars were being sent by sugar jobbers to the trade urging them to buy sugar as a bill was in Congress to tax sugar $1.00 a bag (R. 144).

At the time of the trial respondent's firm was purchasing about 7500 lbs. of sugar per week from one jobber alone and no claim was made that this sugar was being diverted (R. 76).

The amount of sugar sold by Alberico and Funicello was not an unusual amount for the volume of business done by this firm (R. 76).

Summary of Argument.

The question presented by the government as the question to be decided herein is not the question decided by the Circuit Court, and contains unwarranted assumptions and conclusions.

With reference to defendant Alberico, the Court stated:

> "A jury might also have taken the conversation which he had with one of the distillers, Morreale, as

evidence of his knowledge of the kind of business that he was supplying."

The Court a little later continued:

"In the light of all this, it is apparent that the first question is whether the seller of goods, in themselves innocent, becomes a conspirator with—or what is in substance the same thing, an abettor of—the buyer, because he knows that the buyer means to use the goods to commit a crime."

We submit that the above language of the Circuit Court of Appeals is incapable of construction as formulated in the government's posed question.

The distinction between sections 37 and 332 of the Criminal Code as applicable to the instant case we deem of little import, except to call the Court's attention to the fact that this defendant was indicted for conspiracy to violate certain provisions of the Internal Revenue Act and not under the aider and abettor section. The Circuit Court of Appeals has treated the two as synonymous herein and we follow the reasoning of the court.

We concede the government's definition of conspiracy. We deny that this rule is based upon the principal embodied in section 332 of the Criminal Code, but suggest that such conflict is immaterial here.

It is conceded that intent is a necessary ingredient of the charge against this defendant, but the government's conclusion that the familiar rule of criminal liability relative to natural consequences following the act as applicable herein, is challenged as is the argument that the presence

or absence of a "stake" in the success of the enterprise assisted is relevant only as to knowledge.

It is respectfully submitted that knowledge of the specific crime as well as the purpose to use these particular sales as a means to effect the objects of the crime are conditions precedent to any claim of illegality and that the "stake" characterized by the Circuit Court of Appeals presupposes an interest in the success of the crime predicated upon such knowledge and intent.

This court is not concerned with the facts herein other than whether there is any evidence to take the case to the jury, under the assumptions of the Circuit Court.

It is respectfully submitted that the government has entirely failed to sustain its burden that defendant was directly connected with the enterprise herein. That he ever confederated or was acting in concert with the actual participants. That he was an indispensable cog in the operation of same or deliberately cooperated knowingly as a member of the said conspiracy. On the contrary, the Circuit Court found, and we reiterate said finding, that the sales herein of innocent commodities were incidental and not indispensable and were made with mere knowledge that the buyers of same were engaged generally in a criminal enterprise and that any profit obtained by defendant by reason of said sales was not such a stake or interest in the existing conspiracy as would warrant the speculation of a jury as to his knowledge, motive and intent.

It is respectfully submitted that the line of demarcation in cases such as this between acts which are only incidental and those based upon deliberate cooperation for the specific purpose of furthering the aims and objects of the enter-

prise are in each instance a question to be determined in the particular case by the various courts and not left to the unsupervised discretion of divers government officials and prosecutors.

Argument.

It is fundamental that the neglect of a legal duty or the commission of an act innocent in and of itself does not constitute a crime unless some statute so prescribes. Purely statutory offenses cannot be established by implication and acts otherwise innocent and lawful, do not become crimes unless there is clear and positive expression of the Legislature's intent to make them criminal.

No claim is made herein that defendant was an original conspirator. The gist of the government's argument seems to be predicated upon the claim that he became an aider and abettor or at common law, an accomplice or accessory after the fact.

A person is not deemed an accomplice merely because he had knowledge of the intended commission of a crime.

Bird vs. United States, 187 U. S. 118.

It is also true, that one does not become an accessory before the fact by the mere approval of a crime. "Enough must be shown to justify the inference that the offender has counseled or induced or encouraged the crime."

People vs. Swersky, 216 N. Y. 471.

An approval of a crime voiced to the wrong-doer before its commission would not suffice always to charge one as a principal. Long ago it was said in Hale's Pleas of the

Crown, 616: "And therefore words that sound in bare permission make not an accessory."

Mr. Bishop in his work on Criminal Law, Paragraph 695, sets forth the rule that the true test for determining whether one is an accessory after the fact is to consider whether what he did was done by way of personal help to his principal, with a view of enabling the principal to elude punishment. So to furnish one with a horse to escape or to conceal or rescue the principal, renders one an accessory but not so the failing to make known the felony, forebearance to arrest, or charitably supplying the prisoner with food, or agreeing not to prosecute, etc. To the same effect is Wharton on Criminal Law, Par. 241.

Nor would the fact that one received a portion of the stolen property knowing it to be stolen be sufficient at common law.

1 Bish. Cr. Law, Par. 692, 695, 699.

What is the test to be applied to determine whether a person is an accomplice? The courts have repeatedly held that he must be so connected with a crime that at common law he might himself have been convicted either as the principal or as an accessory before the fact. We do not understand from the government's argument that this defendant is claimed to have been an original conspirator and if such claim is made on argument, it must necessarily be based upon inference and not upon direct proof. Further, in this case it would be an inference based upon an inference and of no legal effect. Where the principal circumstances urged from which to infer guilt is wholly based upon an underlying circumstance or inference the same is insufficient.

Every inference must stand upon some clear, direct evidence.

Vernon vs. U. S., 146 Fed. 121, 125.

It is in the intent to do the substantive crime that moral turpitude inheres.

U. S. ex rel. Meyers vs. Day, 54 Fed. 2nd, 336.

The assumption by the Circuit Court of Appeals that a jury might have inferred from one remark had with one of the distillers, Morreale, that the defendant "had knowledge of the kind of business that he was supplying" certainly would not permit them to infer that he had knowledge or was connected with the specific conspiracy itself.

Conspiracy may be established by direct proof or by inference, as a deduction from conduct which discloses a common design on the part of persons charged to act together for the accomplishment of the unlawful purpose.

Where is the common purpose or design herein? Did Alberico do everything a conspirator or aider or abettor in his position would do to facilitate the conspiracy? The very evidence relied upon in the assumption of the Circuit Court to connect him entirely negatives this. He refused to sell on credit.

It has long been settled law that the basis and gist of a civil action for conspiracy are the damages occasioned by the wrongful act of one or more persons, and that the only materiality of the allegations with respect to the conspiracy or combination with those who were not the direct actors is to connect them with or make them responsible for the acts of others.

Cooley on Torts (2nd Ed. P. 143-144).

In determining a question of fact from circumstantial evidence there are two general rules to be observed. First, the hypothestis of delinquency or guilt, should flow naturally from the facts proved and be consistent with them all. Second, the evidence must be such as to exclude to a moral certainty every hypothesis but that of guilt.

Union Pacific Coal vs. U. S., 173 Fed. 737.

U. S. vs. Buchaltar, 88 Fed. 2nd 625.

Vernon vs. U. S., supra.

At common law in misdemeanors there were no accessories, all concerned, whether instigators or perpetrators were principals, except in liquor cases, certain summary offenses, and including negligences. There is authority that the exceptions were predicated upon the absence of joint intent.

Reg. vs. Kendrick, 5 Q. B. (Eng.) 49.

Heyman vs. Reg., L. R. 8 Q. B. 102. (8 Eng. Rul. Cas. 126).

People vs. Powell, 63 N. Y. 88.

At common law, to constitute an accomplice, one must be so connected with a crime that he himself might have been convicted either as the principal or as an accessory before the fact. To warrant such a conviction, the one accused must have taken part in the perpetration of, or preparation for the crime, with intent to assist in the crime. Every act which may have a tendency to assist in the perpetration of the crime is not of absolute necessity criminal. Before it will have that effect it must have been done with the intention on the part of the actor that it shall aid in the commission of the crime. Unless it appears without dispute that

there was such intention, the person doing the act cannot be said to be a principal; and if there is a question whether the act was done with such intent, that question must be submitted to the jury and answered by them in the affirmative, before the actor can be held to be a principal, and consequently before he can be held to be an accomplice.

People vs. Zucker, 20 A. D. 633, affd. on opinion below 154 N. Y. 770.

Of course the jury may not be allowed to speculate, guess or surmise as to the question thus posed, but must make a finding based upon direct evidence or a proper inference from circumstantial evidence, which excludes every reasonable hypothesis but that of guilt and which is of sufficient probative force to warrant its submission. The hypothesis of guilt should flow naturally from the facts proved and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or guilt the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted.

Intent is the purpose to use a particular means to effect a definite result.

Motive is the moving power which impels to action for such result. It is an inducement, or that which leads or tempts the mind to indulge the criminal act. It is resorted to as a means of arriving at an ultimate fact, not for the purpose of explaining the reason of a criminal act which has been clearly proved, but from the important aid it may render in completing the proof of the commission of the act when it might otherwise remain in doubt. With motives in any speculative sense neither the law nor the tribunal which administers it has any concern. (Bur. on Circ. Evidence

296.) It is in cases of proof by circumstantial evidence that the motive often becomes not only material, but controlling, and in such cases the facts from which it may be inferred must be proved. It cannot be imagined any more than any other circumstance in the case.

Mere cooperation without an understanding may not make a conspiracy.

Wiley vs. State, 19 Ariz. 346.

"Abet" is synonymous with "aid" and "assist."

State vs. Flynn, 72 Atl. 296.

It includes knowledge of wrongful purpose in the act of perpetration and implies counseling, encouragement or assistance.

People vs. Lewis, 9 Cal. App. 279 (98 Pac. 1078).

People vs. Bond, 13 Cal. App. 175 (109 Pac. 150).

There can be no criminal responsibility for anything not fairly within the common enterprise. In other words, the principal is quite analogous to that of agency, where the liability is measured by the express or implied authority.

People vs. Knapp, 26 Mich. 112.

The parties must be intentional participants in a common unlawful design. It is not enough that they are casual, incidental cooperators.

The interposition of concurrent wills in pursuance of a common plan makes each confederate liable in the specific enterprise.

It is otherwise, however, if the casual connection between the act and the crime is broken by the interposition of independent responsible human action. Following this to its logical conclusion—a defendant, no matter how wrongful may have been his conduct, is not responsible for the acts of independent parties performed on the objects of the crime without his concert.

Rex vs. Hilton, 2 Lewin C. C. (Eng.) 214.

As has been often said, the gist of the crime of conspiracy is the unlawful agreement. "Conspiracy" exists whenever there is a combination, agreement or understanding tacit or otherwise between two or more persons for purpose of committing unlawful acts.

Fisher vs. U. S., 13 Fed. 2nd 756.

Pettibone vs. U. S., 148 U. S. 197.

The confederation must in and of itself be corrupt. This is implied in the meaning of the term "conspiracy."

People vs. Powell, 63 N. Y. 92.

State, Wood, Prosecutor vs. State, 47 N. Y. L. 461.

And of course it is fundamental that mere passive cognizance of a conspiracy is not sufficient to make a co-conspirator or an aider or abettor.

Reg vs. Barry, 4 Frost and F. (Eng.) 389.

Evans vs. People, 90 Ill. 384.

Procuring implements or other means to be used in the commission of a specific offense with intent that they shall be so uesd, and knowingly assisting the perpetrators of the

offense in preparation therefor, makes one a principle in the consummated offense out supplying implements to one who makes a bad use of them does not render the person supplying them responsible where he acts innocently.

All of the factors mentioned above, namely a specific offense, intent, indispensibility and knowledge of the specific offense are necessary factors.

State vs. Scott, 80 Conn. 317 (68 Atl. 258).

A watchman appointed to guard a bank sees burglars approach and allows them to steal without interruption. By so doing he becomes assistant in the felony. But unless his abstention from interference removes a check which would otherwise prevent the commission of the crime, and is therefore equivalent to a positive act of assistance, the person so abstaining does not become a party to the crime.

Hawkins, J., in *Reg. vs. Coney*, L. R. 8, Q. B. Div. (Eng.) 534, 15 Cox C. C. 46.

The sales of commodities innocent in themselves do not import any agreement or concert of action. Although defendant sold sugar to anyone who had the price and in many instances upon credit, he is only charged herein with sales to Morreale who was a grocer and illegal distiller. As far as the assumption of the Circuit Court goes, the defendant only knew about Morreale and in which category he was so classified as a customer the record is barren. The Circuit Court assumed defendant's knowledge that he was supplying innocent commodities to an illegal distiller. The Court did not imply knowledge of the specific conspiracy itself, and if that is so, there was no existing conspiracy to which the defendant became a party and under sections

332 liability would only attach for the substantive offense if it were committed by defendant.

The ultimate issue as set forth by the government in its brief is not "whether the sales of materials with knowledge that they will be used by the buyer to commit a crime brings the defendant within the scope of Section 332," but rather whether such sale with knowledge that they may be used by the buyer to commit a specific crime make him guilty of violating Section 37. As stated by the Circuit Court in U. S. vs. Peoni, 100 Fed. 2nd, 401, 402, the "various definitions do not turn on the question of probability but rather on the necessity that defendant in some way associated himself and have an interest in the venture, that he participated in it as something he wishes to bring about, that he seek by its action to make it succeed. All the words used—even the most colorless, 'abet,'—carry an implication of purposive attitude toward it."

It is to be noted that the case here presented is that of a mere seller of merchandise who has knowledge that the buyer intends to put it to an unlawful use but who cannot be said in anywise to will the unlawful use to the buyer.

Further, it is the contention of the defendant herein that the assistance itself may not be casual or incidental but must be in effect indispensable and we submit that in all of the cases cited by the government herein as authority for their position these necessary factors are present. Also, in such citations and without exception as far as we can find, the commodities furnished are not inherently innocent but in and of themselves are either dangerous instrumentalities, contraband, or permeated with the taint of violence, illegality or as in the case of real estate providing affirmative shelfer and assistance.

Furthermore, intention is present in each. All of such cases can be distinguished. As in Vukich vs. U. S., 28 Fed. 2nd, 666, the materials were knowingly and intentionally delivered to the distillery and not sold as here at the defendant's regular place of business in the open market. It is not the intention of the defendant to lengthen this brief by attempting to point out to the Court the various distinctions in each and every one of the long list of cases cited by the government. Suffice it to say that in each of these cases there are obvious factors present or missing which differentiate it from the instant case.[2] In looking at one more of the government's cases set forth at length upon the brief herein, namely Backun vs. U. S., 112 Fed. 2nd, 635, in accordance with the above we find that defendant sold an automobile to one Zucker knowing it to have been stolen, and knowing it was to be used in interstate transportation. Again we have a specific crime with the defendant providing an indispensable and essential cog in the criminal design and enterprise.

Certain dicta in the opinion in the Backun case may be construed as prohibiting the sale of any article no matter how innocent or incidental. This conclusion is, we submit, wrong, and where is the line of demarcation to be drawn?

It seems obvious that selling a gun to a known murderer to commit a specific murder would be entirely different than the position of the optician who sells him glasses even though through reputation the optician may know that he may utilize such glasses in order to shoot more accurately. We answer our own query by the suggestion which we be-

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[2] Backun vs. U. S. 112 Fed. 2nd, 635 (sale of stolen goods). Borgia vs. U. S. 78 Fed. 2nd, 550 (Sale—plus delivery to still) Cardival vs. U. S. 50 Fed. 2nd, 166 (lease of property plus hauling of materials) Hubinger Co. vs. U. S. 64 Fed. 2nd, 772 (Company organized for specific purpose of conspiracy and delivery to drops).

lieve to be the law from time immemorial. That in cases of this type each one must stand upon its own feet and the court and appellate courts have and will determine this type of case upon the facts in each particular case.

Upon the argument herein in the instant case, a legitimate coal dealer who provided coal for the still fires or the merchant who sold a box of matches to light said fire or tires for the truck that was to carry the product away would be equally guilty. A wholesale liquor dealer who sold liquor to retailers knowing they were violating laws as to hours of distribution, etc., would be guilty of conspiracy or the farmer who knowingly sold his fruits for the making of illegal wines or his grain for the illegal manufacture of whiskies. If the law was as the government contends, no business man would dare sell any product which might be used illegally by a criminal purchaser unless he first made an exhaustive examination and research as to the purpose for which the buyer intended to use the product.

If a man should go into a reputable hardware store and ask to purchase a pump which would throw a certain stream of water and inform the merchant that he desired to use said pump in the operation of an illegal still, would the merchant under the law, of necessity be compelled to decline the sale by reason of self-implication? Take the plumbers' supply company, who in the ordinary course of business furnishes pipes and couplings to the operator of a still. Would this company be guilty of conspiracy to operate an illegal still and for the failure to pay a tax upon the illegal alcohol to be manufactured? Would it be his duty to procure a bond or do any other act necessary for the legal operation of a distillery? We submit that such

is not the law, nor should such burden be placed upon the ordinary seller of legal goods in an open market and that such far-fetched conclusions seem dangerous and in fact ridiculous.

If there was no existing conspiracy known to the defendant, there was no basis for convicting him as an accessory to an existing conspiracy.

Young vs. U. S., 48 Fed. 2nd, 26 (C. C. A. 5th).

DiBonaventura vs. U. S., 15 Fed. 2nd, 494, 496.

Wtih reference to the latter case the suggestion that the Circuit Court ignored the question of specific knowledge of the existence of a conspiracy is incompatible with their decision and with defendant's interpretation of the court's assumption. The court below logically follows its reasoning in the above case and particularly in the Peoni case and this court will not assume that the Second Circuit based its logic and reasoning upon assumptions which are not apparent and may only be argued by strained construction of the court's language. The reasonable interpretation and the reasonable effect of the language employed is consistent with the past logic of the court in the other cases cited and with the verbiage of the decision in the instant case.

The government concedes that accessorial assistance must be intentional,

Hicks vs. U. S., 150 U. S. 442,

but argues that for most of the purposes of criminal responsibility a consequence is intended when the actor knows that the consequence is likely to follow from the act. With this we generally agree, but fail to see the connection in the case at bar.

Is the government attempting to establish criminal agency or estoppel? If so, it again fails according to settled law. It was a matter of indifference to respondent Alberico what Morreale did with the sugar and tin cans, after the sale was completed. The government made or makes no claim to the contrary and such claim would be ineffectual upon the record herein. There is no proof that if the sale were declined the sugar and materials could not have been obtained elsewhere.

There is nothing in the evidence relied upon herein to show guilty knowledge which presupposes some antecedent understanding. There is not even association other than as vendor and vendee in the ordinary course of established business. The inference must be justified that these sales were a step in the consummation of a comprehensive plan and in reality a continuing agency, to justify this portion of the government's argument, and the Circuit Court did not and could not under the proof in this case assume any such facts. In viewing the totality of the acts we must be able to perceive the nexus of the common scheme. That there was more than one sale is immaterial. We find no principal of criminal law which recognizes the relation of principal and agent in the exact sense in which the term is used in reference to business or commercial transactions. In Civil actions upon contract the course of dealing between parties may be proved to establish a general agency but that principle has no place in criminal jurisprudence. From such evidence in civil actions a presumption is raised that the relation shown to exist in other transactions continues or an estoppel is created which prevents the principal from denying the agency, and hence is presumptive or conclusive evidence of the fact. No such presumption or conclusion

arises in a criminal case. There the presumption is of innocence and the doctrine of estoppel has no application. Criminal agency is merely another word for criminal conspiracy. The agency that will subject the employer or agent to criminal liability must be an actual agency and not merely apparent.

It is axiomatic that so long as the burden is upon the government of not only removing the presumption of innocense but of establishing the guilt of the accused beyond a reasonable doubt, a mere scintilla or even some proof is not sufficient to warrant the submission of the case to the jury.

People v. Owens, 148 N. Y. 648.

Insufficient evidence is still in the eyes of the law, no evidence.

Matter of Case, 214 N. Y. 199, 203.

We earnestly contend that in this case it must be held as a matter of law, that the proof was of such a character and fell so far below the standard prescribed by law, that the case against this defendant should have been withdrawn from the jury.

The words by which defendant's knowledge was assumed herein negative and disapprove criminal theory. If the appellant herein was in fact a conspirator would he have said, "I can't trust you because your business is too risky?" Would he not more likely have said, "Why certainly you can have the sugar. That is my part in this enterprise. When you sell the alcohol, pay me for the sugar and I will divide up the profits," or that in substance.

The latter statement would have been the act of a conspirator and we submit the actual statement conclusively establishes that defendant had no interest or stake in the criminal enterprise. It seems apparent that he was interested solely in the sale of his merchandise and there is no evidence in the case, omitting the assumption of the Circuit Court, that defendant herein knew that Morreale was not taking this merchandise to his grocery store rather than to his still.

The government concedes that no accessorial liability exists in the absence of actual knowledge of the existence of a criminal plan which will be furthered by the acts of assistance. It contends, however, that when such knowledge exists, assistance is intentional and criminal liability ensues and cites for sustaining authority, certain excerpts taken from the writings of Mr. Justice Holmes. The dicta cited is from entirely dissimilar cases and upon unrelated theories and seems to us to emphasize the desparation of the government's argument. We earnestly believe that the immortal champion of human rights and justice would be the first to repudiate such a construction and application of his language to the instant case, were he present here once more.

It has been suggested by the government that the rule of law laid down by the Circuit Court of Appeals places a restriction which nullifies the only effective weapon for speedy conviction of a wide spread criminal combination in one trial and that unwarranted immunity is confered upon persons who knowingly facilitate the commission of crimes.

However desirable such a weapon may be, it should be provided by legislative action rather than by judicial expansion of the conspiracy statute.[3]

Their conclusion presumes intent and criminal responsibility, where any assistance, no matter how trivial, is knowingly given. But what do they mean by assistance? Clearly, at common law and today an abstention from interference unless based upon affirmative duty, would not be enough. To urge that one who performs an incidental act would necessarily come within this category, would be to jeopardize our entire business and social structure. We respectfully suggest that assistance in its legal criminal effect is more confined than this broad conclusion and requires deliberate cooperation or concerted action in the specified offense in some indispensable way.

As recently stated in the unanimous opinion of the New York Court of Appeals in People vs. Hines, decided October 8, 1940, in discussing appellant's contention that the proof failed to establish that he assisted in contriving, proposing or drawing a lottery, the Court said:

> "In urging his contention defendant fails to distinguish between a case where the only connection of a person with a lottery begins and ends with his performance of incidental acts specified in the particular sections above, and a case where such person performs acts in deliberate cooperation with those conducting and managing the lottery enterprise itself. (Cf. Commonwealth vs. Harris, 95 Mass. 534; State v. Wong Took, 147 Wash. 190). From the activities of defendant set forth above, it is impossible

[3] Harvard Law Review, Vol. 53, page 1392.

to see how he could have been more directly connected with the enterprise. Even assuming that appellant did not physically "contrive propose or draw a lottery" nevertheless those with whom he had confederated and with whom he was acting in concert, to wit, Schultz and his henchmen, were plainly engaged in the physical administration and operation of a lottery. Since some of the members of the combination were engaged in the physical task of drawing and selecting the winning numbers, it follows that the conspiracy necessarily involved the commission of the crimes denounced by section 1372 of the Penal Law. The sole remaining question, therefore, relates to the participation of appellant therein, which would seem to be completely answered by the concession of defendant that the evidence established membership in the conspiracy to commit the crimes charged in the indictment. Defendant was charged and found guilty of the acts of affording protection from arrest and, if arrested, immunity from conviction. Hence, he was an indispensible cog in the inside running of this enterprise, or he was nothing. As the Appellate Division noted, the proof was to the effect that the policy game "could not have been carried on without such protection." To urge that one who provided such protection performs just another incidental act similar to the letting of premises for lottery purposes or the collecting of policy slips and carrying them from one destination to another, is to lose sight of the distinction noted above between the connection with the lottery which begins and ends with the incidental

act, and where such act is in deliberate cooperation with those conducting and managing the lottery enterprise itself. In other words, while a person who sells to another $10,000.00 worth daily of tickets may be guilty of a misdemeanor under section 1373, in selling lottery tickets, he may also be charged with violating section 1372 if the jury finds that he has acted in concert and cooperation with the persons who contrived, proposed or drew the lottery. So in the case at bar appellant could unquestionably have been prosecuted for conspiracy to obstruct justice. But his guilt of that crime would afford him no defense when prosecuted for violating section 1372 in view of the fact that he was a member of the conspiracy to commit the crimes charged in the indictment and was deliberately acting in concert with those operating and conducting the lottery. Where the line would be drawn between acts which were only incidental and those which were deliberate cooperation with those conducting and managing the lottery enterprise and for the specific purpose of furthering the aims and objects of that enterprise, would be in each instance a question to be determined in the particular case."

Of course a person may withdraw from a conspiracy after an incidental act of assistance. Of course they are not conspirators—"the people who fix the leaking roof of the still or sell the gambling house one pack of cards even should those persons know the nature of the enterprise they are assisting." The government further concedes the innocence of "The charwoman who in the ordinary course of her duties, cleans the offices which the conspirators use

even if she knows of the criminal plan" although her work is of some assistance. These people have no interest in the fruits of the enterprise itself. These people are not criminals.

In answer to the obvious query of where criminality ends and innocence begins, under the presumption, the government ingenuously suggests that the line of demarcation be left to the restraint of the prosecutors and the common conscience of the court and jury and not by a definite rule of law. If by this statement they accept the logic and result of the Circuit Courts' decision herein as based upon the individual case, they are agreeing with our contention herein and with the reasoning of the New York Court of Appeals, but in the same breath they ask this court to lay down a sweeping and inclusive rule applicable to all these kind of cases based upon the contention that the Circuit Court has negatively done the same thing. We do not so interpret the decision of the lower court and we respectfully ask this court to consider the reasoning of the New York Court of Appeals in the Hines case, supra, which we consider analageous to the Circuit Court's reasoning in the Young case, and the Peoni case and in the instant case. It is true there may be apparent ambiguity in some of the language in the opinion, taken with the treatment of the cases, but it is respectfully submitted that the Circuit Court as was its right and duty, was serving notice upon prosecutors generally, that the present day tendency to sweep within the dragnet of conspiracy everyone who had been associated in any degree with the main offenders no matter how innocent constituted an improper conception of duty.

The "stake" mentioned by the court adds nothing to the interest and intent which have always been necessary in this type of case, and serves as no standard of immunity in future cases where the necessary criminal factors are present. The practical effect of the decision is to advise the government that where an established businessman sells innocent commodities in the regular course of business in the open market for the regular sale price as in the instant case, those facts in and of themsleves do not make him a co-conspirator or aider or abettor of the criminal vendee and that prosecutors should be more judicial in their analysis of the proof in that type of case than they sometime have been in the past.

CONCLUSION.

The decision of the Circuit Court of Appeals for the Second Circuit should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 42.—October Term, 1940.

The United States of America, Petitioner, *vs.* Salvatore Falcone, Joseph Falcone, Henry Alberico, Nicholas Nole and John Nole.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 9, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

The question presented by this record is whether one who sells materials with knowledge that they are intended for use or will be used in the production of illicit distilled spirits may be convicted as a co-conspirator with a distiller who conspired with others to distill the spirits in violation of the revenue laws.

Respondents were indicted with sixty-three others in the northern district of New York for conspiring to violate the revenue laws by the operation of twenty-two illicit stills in the vicinity of Utica, New York. The case was submitted to the jury as to twenty-four defendants, of whom the five respondents and sixteen operators of stills were convicted. The Court of Appeals for the Second Circuit reversed the conviction of the five respondents on the ground that as there was no evidence that respondents were themselves conspirators, the sale by them of materials, knowing that they would be used by others in illicit distilling, was not sufficient to establish that respondents were guilty of the conspiracy charged. 109 F. (2d) 579. We granted certiorari, 310 U. S. 620, to resolve an asserted conflict of the decision below with those of courts of appeals in other circuits. *Simpson* v. *United States*, 11 F. (2d) 591; *Pattis* v. *United States*, 17 F. (2d) 562; *Borgia* v. *United States*, 78 F. (2d) 550; *Marino* v. *United States*, 91 F. (2d) 691; see *Backun* v. *United States*, 112 F. (2d) 635. Compare *Young* v. *United States*, 48 F. (2d) 26.

All of respondents were jobbers or distributors who, during the period in question, sold sugar, yeast or cans, some of which found their way into the possession and use of some of the distiller defend-

ants. The indictment while charging generally that all the defendants were parties to the conspiracy did not allege specifically that any of respondents had knowledge of the conspiracy but it did allege that respondents Alberico and Nole brothers sold the materials mentioned knowing that they were to be used in illicit distilling. The court of appeals, reviewing the evidence thought, in the case of some of the respondents, that the jury might take it that they were knowingly supplying the distillers. As to Nicholas Nole, whose case it considered most doubtful, it thought that his equivocal conduct "was as likely to have come from a belief that it was a crime to sell the yeast and cans to distillers as from being in fact any further involved in their business". But it assumed for purposes of decision that all furnished supplies which they knew ultimately reached and were used by some of the distillers. Upon this assumption it said, "In the light of all this, it is apparent that the first question is whether the seller of goods, in themselves innocent, becomes a conspirator with—or, what is in substance the same thing, an abettor of—the buyer because he knows that the buyer means to use the goods to commit a crime. And it concluded that merely because respondent did not forego a "normally lawful activity of the fruits of which he knew that others were making unlawful use" he is not guilty of a conspiracy.

The Government does not argue here the point which seems to be implicit in the question raised by its petition for certiorari, that conviction of conspiracy can rest on proof alone of knowingly supplying an illicit distiller, who is not conspiring with others. In such a case, as the Government concedes, the act of supplying or some other proof must import an agreement or concert of action between buyer and seller, which admittedly is not present here. Cf. *Gebardi* v. *United States*, 287 U. S. 112, 121; *Di Bonaventura* v. *United States*, 15 F. (2d) 494. But the Government does contend that one who with knowledge of a conspiracy to distill illicit spirits sells materials to a conspirator knowing that they will be used in the distilling, is himself guilty of the conspiracy. It is said that he is, either because his knowledge combined with his action makes him a participant in the agreement which is the conspiracy, or what is the same thing he is a principal in the conspiracy as an aider or abettor by virtue of § 332 of the Criminal Code, 18 U. S. C. § 550, which provides: "Whoever directly commits any act con-

stituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

The argument, the merits of which we do not consider, overlooks the fact that the opinion below proceeded on the assumption that the evidence showed only that respondents or some of them knew that the materials sold would be used in the distillation of illicit spirits, and fell short of showing respondents' participation in the conspiracy or that they knew of it. We did not bring the case here to review the evidence, but we are satisfied that the evidence on which the Government relies does not do more than show knowledge by respondents that the materials would be used for illicit distilling if it does as much in the case of some.[1] In the case of Alberico, as in the case of Nicholas Nole, the jury could have found that he knew that one of their customers who is an unconvicted defendant was using the purchased

[1] The two Falcones who were in business as sugar jobbers were shown to have sold sugar to three wholesale grocers who in turn were shown to have sold some of the sugar to distillers. To establish guilty knowledge the Government relies upon evidence showing that the volume of their sales was materially larger during the periods of activity of the illicit stills; that Joseph Falcone was shown on two occasions, at one of which Salvatore Falcone was present, to have been in conversation with one of the conspirators who was a distiller, and on one occasion with another distiller conspirator who was his brother-in-law; that Joseph Falcone had been seen at the Venezia Restaurant which was patronized by some of the conspirators and knew its proprietor; and on two occasions Salvatore Falcone had visited the restaurant, on one to collect funds for the Red Cross and on another for a monument to Marconi.

Respondent Alberico was a member of a firm of wholesale grocers who dealt in sugar and five-gallon tin cans among other things. They sold sugar to wholesale grocers and jobbers. To establish Alberico's guilty knowledge the Government relies on evidence that his total purchases of sugar materially increased during the period when the illicit stills were shown to be in operation; that some of his sugar purchases from a local wholesaler were at higher prices than he was then paying others; that on the premises of one of the distillers there were found fifty-five cardboard cartons, each suitable for containing one dozen five-gallon cans, on one of which was stencilled the name of Alberico's firm; that on eight to ten occasions Alberico sold sugar and cans in unnamed amounts to Morreale, one of the defendant distillers who was not convicted, and on one occasion was overheard to say, in refusing credit to Morreale, "I could not trust you because your business is too risky."

Respondent Nicholas Nole was shown to be proprietor of Acme Yeast Company and also the Utica Freight Forwarding Company, to which one and one-half tons of K & M yeast was consigned by the seller. Wrappers bearing the distinctive marks of the Acme Yeast Company and K & M yeast, quantity not stated were found at one of the stills; and a K & M yeast container was found at another. To show guilty knowledge of Nicholas Nole the Government relies on the circumstance that he registered the Acme Yeast Company in the county clerk's office in the name of a cousin; that the order for the consignment of K & M yeast was placed in the name of an unidentified person; that Nole had been seen in conversation with some of the convicted distillers at a time when

material in illicit distilling. But it could not be inferred from that or from the casual and unexplained meetings of some of respondents with others who were convicted as conspirators that respondents knew of the conspiracy. The evidence respecting the volume of sales to any known to be distillers is too vague and inconclusive to support a jury finding that respondents knew of a conspiracy from the size of the purchases even though we were to assume what we do not decide that the knowledge would make them conspirators or aiders or abettors of the conspiracy. Respondents are not charged with aiding and abetting illicit distilling, and they cannot be brought within the sweep of the Government's conspiracy dragnet if they had no knowledge that there was a conspiracy.

The gist of the offense of conspiracy as defined by § 37 of the Criminal Code, 18 U. S. C. § 88, is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. *Pettibone* v. *United States,* 148 U. S. 197; *Marino* v. *United States, supra; Troutman* v. *United States,* 100 F. (2d) 628; *Beland* v. *United States,* 100 F. (2d) 289; cf. *Gebardi* v. *United States, supra.* Those having no knowledge of the conspiracy are not conspirators, *United States* v. *Hirsch,* 100 U. S. 33, 34; *Weniger* v. *United States,* 47 F. (2d) 692, 693; and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge. On this record we have no occasion to decide any other question.

Affirmed.

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some of the illicit stills were in operation, and that on one occasion during that period he sold and delivered fifteen five-gallon cans of illicit alcohol from a source not stated.

Respondent John Nole was shown to be a distributor for the National Grain Yeast Company in Utica during the period in question. Yeast wrappers bearing the National labels were found at three of the stills. To show guilty knowledge of John Nole the Government relies on evidence that he had assisted his brother Nicholas in unloading yeast at the Utica Freight Forwarding Co.; that he was a patron of the Venezia Restaurant; that on one occasion he was seen talking with Morreale, the unconvicted distiller, in the vicinity of a store in Utica, whose store it does not appear. On three occasions Morreale and another convicted defendant procured yeast in cartons and some in kegs at the store and on one occasion John Nole told the person in charge of the store to let them have the yeast; that John Noles' information return required by the Government of all sales of yeast in excess of five pounds to one person did not show in February or March, 1938, any sale of yeast to Morreale or any sale of keg yeast.